Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Tariff Filing Requirements for	)	CC Docket No. 93-36
Nondominant Common Carriers	)	

Reply Comments of the
Custom Network Service Users Group
on the Petition for Partial Reconsideration
of the Ad Hoc Telecommunications Users Committee

The Custom Network Service Users Group ("CNSUG"), whose members are large users of interstate interexchange services and include customers of all of the major interexchange carriers, file these reply comments in support of the petition of the Ad Hoc Telecommunications Users Committee ("Ad Hoc")[1] for partial reconsideration of the Commission's Memorandum Opinion and Order in the above-captioned proceeding.[2]

CNSUG supports the Commission's decision to streamline the regulation of nondominant carriers. But, as CNSUG pointed out in its reply comments in this docket,[3] the Commission can maximize the benefits of

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1 Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, Petition of Ad Hoc Telecommunications Users Committee for Partial Reconsideration, filed September 22, 1993 ("Ad Hoc Petition").

2 Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, FCC 93-401, Memorandum Opinion and Order, released August 18, 1993 ("Order").

3 Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, Reply Comments of the Custom Network Service Users Group, filed April 19, 1993.

competition in the interstate interexchange marketplace only if it enacts safeguards to prevent nondominant carriers from using the tariff regime mandated by the Communications Act as a shield when they seek to abrogate long term contracts with their customers.

The Commission's decision will -- unintentionally, we believe -- allow nondominant carriers to avoid the well-established legal principle that all parties to a contract must honor their respective commitments or face liability for damages. *See* Order at ¶ 25. The Order would leave customers without the protections they would ordinarily enjoy in a competitive environment, while shielding the carriers (through the filed rate doctrine) from the responsibilities that they would ordinarily bear in an unregulated setting.[4] We urge that the Order be modified to protect against this is unintended consequence of the Commission's otherwise praiseworthy efforts to facilitate competition in the interstate interexchange marketplace.

Both Ad Hoc and other parties filing comments in support have ably stated the case for partial reconsideration. We limit these Reply Comments to four points.

First, Ad Hoc and the other users supporting the petition have demonstrated that the mere existence of competition does not preclude parties from engaging in opportunistic (and illegal) practices that work to the detriment

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[4] Under the filed rate doctrine, the tariff governs the relationship between a carrier and its customers, and a tariff term supersedes a conflicting term in any contract between the parties. Because carriers can unilaterally modify their tariffs, subject only to the statutory requirements as to form and lawfulness, they are free to make changes to the tariff that supersede the contract. *See* Ad Hoc Petition at 2-3.

of their customers.[5] That history offers little reason to believe that a carrier wishing to breach its contractual commitments to customers will be deterred by the fear of losing one or more customers to a competitor.[6]

Even the relatively short history of negotiated tariffs for telecommunications services has demonstrated the risk that carriers will seek to modify agreed-upon terms in ways detrimental to their customers. Earlier this year, AT&T sought to modify the general regulations of its Tariff 12 by imposing a charge for new vertical features associated with inbound service capabilities. Of significance here is the fact that AT&T *also* sought to eliminate the right of customers to terminate their Tariff 12 arrangements without liability -- a right that arises not from this Commission's rules but from the carrier's own Tariff -- if AT&T should increase those charges in the future.[7] AT&T cut the proposed new

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5 *See* Ad Hoc Petition at 5-8 (citing extensive case law and law review commentaries on this subject); Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, Comments of Citicorp, filed October 29, 1993, at 2-3; Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, Comments of Tele-Communications Association, filed October 29, 1993, at 3 ("Comments of Tele-Communications Association").

6 Competition is even less likely to protect customers where the carrier is impervious to such concerns. For example, where a carrier goes out of business and therefore no longer has any reputation interest at stake, a trustee in bankruptcy could (and, indeed, may be obligated to) invoke the filed tariff doctrine to raise rates or curtail service. Ad Hoc Petition at 8; Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, Comments in Support of Petition for Partial Reconsideration of the American Petroleum Institute, filed October 29, 1993, at 5-6. A similar nightmare is coming true in the trucking industry, where hundreds of thousands of customers are receiving retroactive bills that may (according to the Interstate Commerce Commission) total as much as $32 billion, as bankruptcy trustees seek to enforce the filed rate doctrine against customers who had negotiated discounted rates with the carriers in good faith reliance on agency regulations. *See* J. Bovard, "The Great Truck Robbery," *The Wall Street Journal*, Nov. 3, 1993, p. A22 (describing the fall-out from the Supreme Court's decision in Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 110 S. Ct. 1759 (1990)). A carrier's shareholders could work similar mischief by means of a derivative suit.

7 AT&T Tariff F.C.C. No. 12, Sections 7.2.17.A.1 and 7.2.17.A.2. The proposal also sought to exempt vertical feature charges from AT&T's waiver of its right to raise rates or make other materially adverse revisions without the customer's consent. *See* AT&T Tariff F.C.C. No. 12, Sections 7.2.9.H and 7.2.9.I.

charge in half and withdrew the anti-termination provision before the transmittal became effective only because some customers received advance notice of the filing and were able to use the tariff review process to protest the change as an unreasonable carrier practice.[8]

Second, competitive alternatives provide cold comfort to customers taking service under negotiated tariffs if they do not have the right to terminate their service arrangements without liability should the carrier modify the tariff without the customer's consent. As long as a customer remains subject to termination penalties -- even in the face of tariff changes that alter the terms of the original bargain -- it will be unable to take its business elsewhere prior to the expiration of the (breached) agreement. Competition will encourage carriers to honor their contractual obligations *only* if the Commission's nondominant carrier rules are modified to (1) prohibit carriers from making unilateral tariff changes without justification, (2) provide a meaningful forum for customer to challenge such unilateral changes,[9] and (3) allow customers that do not consent to such changes to take advantage of the remedies available in the unregulated world of commercial contracts -- *i.e.,* termination without liability or specific performance/expectation damages. Ad Hoc and supporting commenters have laid out the law on this issue; the only question here is whether the Commission will permit customers to exercise the same rights in buying telecommunications

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8 *Compare* AT&T Communications Revision to Tariff F.C.C. No. 12, Tariff Transmittal No. 5047 (filed April 16, 1993) *with* AT&T Communications Revision to Tariff F.C.C. No. 12, Tariff Transmittal No. 5442 (filed July 14, 1993). While such incidents are not commonplace, the case described in the text is not unique. *See* AT&T Communications Revision to Tariff F.C.C. No. 12, Contract Tariff Transmittal No. 632 (filed Sept. 9, 1993) (proposed revision to Contract Tariff 383 protested by customers and modified in Application No. 188 on Nov. 3, 1993).

9 *See* note 11, below.

services that they enjoy when they contract for non-telecommunications services.

Third, competition may not be quite the panacea the Commission apparently believes it is, largely because of the substantial costs and risks of service disruption that customers incur when switching carriers. For large users -- that is, those entities that enter into negotiated tariff arrangements with carriers -- changing carriers is not as simple as changing a primary interexchange carrier ("PIC") designation. It requires that dedicated circuits (interexchange carrier circuits *and* access links) be physically moved, that networks be reconfigured, that new billing arrangements be tested and that customer personnel be re-trained. When large customers contemplate such a move, they typically factor in a 6-to-9 month transition period before their networks will be fully converted. In acknowledgment of this fact, AT&T guarantees its Tariff 12 customers rate stability for a minimum of 3 months during which they can make the transition to a successor vendor upon expiration of the term; some customers with more complex networks have negotiated longer periods.[10] These realities make it safe to say that, faced with a unilateral tariff change, termination even without liability may not pose an attractive short term option for the customer. For that reason, customers must be afforded an opportunity to challenge the unconsented tariff change and, if successful, prevent its application.[11]

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10 AT&T Communications Tariff F.C.C. No. 12 at Section 7.2.15 (phase-out period of not less than three months); *see* AT&T Communications Tariff F.C.C. No 12, Section 7.77.1.D (six month phase-out period).

11 It is critical that customers be able to protest a tariff prior to its taking effect. Formal complaints, the only other vehicle for challenging a tariff, suffer from two related problems. First, as the Commission is well aware, the complaint process is operating under heavy resource and staffing constraints that can significantly delay final resolution of formal complaints. Second, during the three-to-five years it can take for the Commission to resolve a formal complaint, the

Finally, there is no good reason *not* to subject nondominant carriers to the rules that operate in the commercial marketplace that these carriers (and the Commission and, we hasten to add, large users) seek to replicate in the world of negotiated network service arrangements. If, as MCI stresses in its opposition to Ad Hoc's petition, "it has never entered into a written contract with a customer that was signed by an authorized MCI representative and thereafter was not honored according to its terms,"[12] the safeguards advocated here will impose no cost or other burden whatsoever on MCI. In contrast to the regulations the Commission has previously eliminated for nondominant carriers,[13] the safeguards urged by the CNSUG would not require carriers to retain records, file reports or the like. They would simply permit a customer to protect itself if a carrier sought to modify a tariff unilaterally in reliance on the filed rate doctrine.

For all the foregoing reasons, CNSUG urges the Commission to reconsider its nondominant carrier tariff filing regulations and require carriers to:

(1) give customers advance notice of any tariff filing that will materially alter the terms or conditions of a contract tariff;

(2) require carriers to secure the consent of all affected customers before making such a filing;

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carrier would be free to charge whatever it pleased for its services or to otherwise abrogate its agreement with a customer. The public interest is thus well served by a viable tariff review process, which should be preserved. *See* Comments of Tele-Communications Association at 5.

12 Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, Opposition of MCI Telecommunications, filed October 29, 1993, at 2-3.

13 *See, e.g.,* Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report & Order, 85 F.C.C.2d 1, 33-35 (1980) (eliminating the cost and other economic support requirements for non-dominant carrier tariff filings), and at 38 (declining to impose reporting requirements on nondominant carriers).

(3) make the filings effective on at least 14 days' notice, not one day's notice as the Order provides;

(4) treat the fact that all affected customers have not consented to a proposed tariff change as *prima facie* evidence of unlawfulness; and

(5) allow any affected customer that has not consented to a tariff change to compel application of the negotiated terms or terminate its service arrangement without liability and require a reasonable period of rate stability to permit service migration if the customer chooses the latter option.

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Certificate of Service

I, Meredith Forman, hereby certify on this 8th day of November, 1993, true and correct copies of the Reply Comments of the Custom Network Service Users Group on the Petition for Partial Reconsideration of the Ad Hoc Telecommunications Users Committee were served by first class mail, postage prepaid, upon following parties:

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